

CHAPTER 1.

Introduction

The federal government requires state and local governments to operate the Federal Disadvantaged Business Enterprise (DBE) Program if they receive U.S. Department of Transportation (USDOT) funds for transportation projects. The Arizona Department of Transportation (ADOT) has been operating some version of the Federal DBE Program since the 1980s.

ADOT must set a separate overall goal for participation of DBEs in USDOT-funded contracts for each of three types of USDOT funds it receives: (a) Federal Highway Administration (FHWA) funds, (b) Federal Transit Administration (FTA) monies and (c) Federal Aviation Administration (FAA) funds. Each overall goal is expressed as the percentage of contract dollars that will go to firms certified as DBEs. Each overall goal is for three years, and every year ADOT must set a new overall annual goal for one of these different operating administrations within USDOT. The new three-year goal for FTA-funded contracts must be in place starting October 1, 2015 and the new goal for FAA-funded contracts will start October 1, 2016.

The USDOT recommends that agencies such as ADOT conduct disparity studies to develop the information needed to effectively implement the Program. ADOT last completed a full disparity study in 2009. ADOT retained Keen Independent Research LLC (Keen Independent) to conduct the 2014 DBE Availability Study and the 2015 Disparity Study.

In summer 2014 Keen Independent released the Availability Study with preliminary research results that ADOT used to make certain decisions about the operation of the Federal DBE Program for its FHWA-funded contracts beginning October 2014. Based in part on the 2014 Availability Study, ADOT submitted a preliminary overall DBE goal of 9.38 percent for FHWA-funded contracts for FFY 2015 through FFY 2017, which was approved by FHWA. The 2015 Disparity Study contains more information, which ADOT can use to refine this preliminary overall goal and review its operation of the Federal DBE Program.

ADOT can also use information from the 2015 Disparity Study to set its future overall DBE goals for FTA- and FAA-funded contracts. The website www.adotdbestudy.com provides ADOT's proposed overall goals, information about public meetings and how to submit written comments, and other information about the disparity study.

The balance of Chapter 1:

- A. Introduces the study team;
- B. Provides background on the Federal DBE Program;
- C. Outlines the analyses and describes where results appear in the report; and
- D. Provides information about public meetings held in July 2015 and the public comment process.

A. Study Team

David Keen, Principal of Keen Independent, directed this study. He has conducted similar studies for about 80 public agencies throughout the country, including a number of state transportation departments. Keith Wiener from Holland & Knight provided the legal framework for this study. Mr. Wiener has extensive experience with disparity studies as well, and has worked with Mr. Keen in this field since the early 1990s. Mr. Keen and Mr. Wiener have helped public agencies successfully defend DBE and minority business enterprise programs in court.

The Keen Independent study team includes the seven companies listed below. Five of the team members are minority- and/or women-owned firms.

Figure 1-1.
2015 Disparity Study team

Firm	Location	Team Leader	Responsibilities
Keen Independent Research LLC, prime consultant	Wickenburg, AZ Denver, CO	David Keen Principal	All study phases
Holland & Knight LLP (H&K)	Atlanta, GA	Keith Wiener Partner	Legal framework
Customer Research International (CRI)	San Marcos, TX	Sanjay Vrudhula President	Availability telephone interviews
Así Marketing Group	Phoenix, AZ	Letty Alvarez Principal	In-depth interviews, public outreach
Don Logan & Associates	Chandler, AZ	Don Logan Principal	In-depth interviews
The Genesis Consulting Group	Phoenix, AZ	Mary Ortega-Itsell President	In-depth interviews for aviation
Gordley Group	Tucson, AZ	Jan Gordley President	In-depth interviews, public outreach

B. Federal DBE Program

ADOT has been operating some version of a Federal DBE Program since the 1980s. After enactment of the Transportation Equity Act for the 21st Century (TEA-21) in 1998, USDOT established a new Federal DBE Program to be operated by state and local agencies receiving USDOT funds. USDOT recently revised the Federal DBE Program in 2011 and again in 2014.

Federal regulations in 49 CFR Part 26 direct how state and local governments must operate the Federal DBE Program.¹ If necessary, under the federal regulations, the Program allows state and local agencies to use DBE contract goals, which ADOT currently sets on certain FHWA-funded contracts. When awarding those contracts, ADOT considers whether or not a bidder or proposer meets the DBE goal set for the contract or shows good faith efforts to do so.

The Federal DBE Program also applies to cities, towns, counties, transportation authorities, tribal governments and other jurisdictions that receive USDOT funds as a subrecipient of ADOT.

Key Program elements. Components of the Federal DBE Program include the following elements.

Setting an overall goal for DBE participation. ADOT must develop an overall three-year goal for DBE participation in its USDOT-funded contracts. The Federal DBE Program sets forth the steps an agency must follow in establishing its goal, including development of a “base figure” and consideration of possible “step 2” adjustments to the goal.²

ADOT’s overall goal for DBE participation is aspirational. Failure to meet an annual DBE goal does not automatically cause any USDOT penalties unless an agency fails to administer the DBE Program in good faith. However, if ADOT does not meet its overall DBE goal, federal regulations require it to analyze the reasons for any shortfall and develop a corrective action plan to meet the goal in the next fiscal year.³

ADOT’s preliminary goal for the three-year period beginning October 2014 is 9.38 percent, an increase from its 7.76 percent DBE goal for the FFY 2012 through FFY 2014 period. The 2015 Disparity Study includes additional results for ADOT review as it considers whether to refine its current three-year DBE goal.

The Disparity Study also provides information for ADOT as it sets overall three-year DBE goals for FTA- and FAA-funded contracts. ADOT’s current overall goals are 3.82 percent for FTA-funded contracts and 3.30 percent for FAA-funded contracts.

Establishing the portion of the overall DBE goal to be met through neutral means. Regulations governing operation of the Federal DBE Program allow for state and local governments to operate the program without the use or with limited use of race- or gender-based measures such as DBE contract goals. According to program regulations 49 CFR Section 26.51, a state or local agency must meet the maximum feasible portion of its overall goal for DBE participation through “race-neutral means.” Race-neutral program measures include removing barriers to participation of firms in general or promoting use of small or emerging businesses (see 49 CFR Section 26.51(b) for more examples of race-neutral program measures). If an agency can meet its goal solely through race-neutral means, it must not use race-conscious program elements. For example, a state DOT operating a 100 percent race- and gender-neutral program would not apply DBE contract goals.

The Federal DBE Program requires that an agency project the portion of its overall DBE goal that it will meet through neutral measures and the portion, if any, to be met through race-conscious

¹ 49 CFR Part 26 http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr26_main_02.tpl.

² 49 CFR Section 26.45.

³ 49 CFR Section 26.47.

measures such as DBE contract goals. USDOT has outlined a number of factors for an agency to consider when making that determination.⁴

Many state DOTs project that they will meet their overall DBE goal through a combination of race-neutral and race-conscious measures. Some DOTs have operated the Federal DBE Program solely through neutral measures and without the use of DBE contract goals (state DOTs in Florida, Idaho, Maine, New Hampshire and Vermont are examples). These agencies projected that 100 percent of their overall DBE goal will be met through neutral means.

The 2014 Availability Study provided ADOT preliminary information to consider when making this projection for its FHWA-funded contracts. In its September 2014 goal submission, ADOT projected that it would meet 5.44 percentage points of its 9.38 percent overall DBE goal through neutral means. That left a balance of 3.94 percentage points of the overall goal to be met through DBE contract goals.

The 2015 Disparity Study provides additional results for ADOT to refine its projection.

Determining whether all racial/ethnic/gender groups will be eligible for race or gender-conscious elements of the Federal DBE Program. Under the Federal DBE Program, the following race/ethnic/gender groups can be presumed to be socially disadvantaged:

- Black Americans (or “African Americans” in this study);
- Hispanic Americans;
- Native Americans;
- Asian-Pacific Americans;
- Subcontinent Asian Americans; and
- Women of any race or ethnicity.

To be economically disadvantaged, a company must be below an overall revenue limit and an industry-specific limit, and its firm owner(s) must be below net worth limits.⁵ White male-owned firms and other ethnicities not listed above can also meet the federal certification requirements and be certified as DBEs if they demonstrate that they are both socially and economically disadvantaged, as described in 49 CFR Part 26.67 (d). (This has occurred in Arizona.)

ADOT’s current operation of the Program, similar to most states, includes DBEs owned by each of the above minority groups and women as eligible for race- and gender-conscious measures including meeting DBE contract goals. However, USDOT provides a waiver provision if an agency determines that it does not need to include certain racial, ethnic or gender groups in the race- or gender-

⁴ See Chapter 7 of this report for an in-depth discussion of these factors.

⁵ 49 CFR 26 Subpart D provides certification requirements. There is a gross receipts limit (currently not more than \$22,410,000 annual three-year average revenue, and lower limits for certain lines of business) and a personal net worth limit (currently \$1.32 million excluding equity in the business and primary personal residence) that firms and firm owners must fall below to be able to be certified as a DBE. <http://www.ecfr.gov/cgi-bin/text-idx?SID=5423bdfc26c2255acf5fb43c3f450a13&node=49:1.0.1.1.20.4&rgn=div6>. Under 49 CFR Section 26.67(b), a certifying agency may consider other factors to determine if an individual is able to accumulate substantial wealth, in which certification is denied (annual gross income of the owner and whether the fair market value of the owner’s assets exceed \$6 million are two such factors that may be considered).

conscious portions of the Federal DBE Program. Some state DOTs have operated contract goals programs for “Underutilized DBEs” (UDBEs), which do not include all DBE groups. Those states determined the DBE groups that were UDBEs in part by examining results of disparity analyses for each racial, ethnic and gender group.

Agencies that operate UDBE contract goals programs:

- Only count UDBEs toward meeting the goal set on an individual contract. For example, Oregon DOT only counts African American- and Subcontinent Asian American-owned DBEs toward meeting a DBE goal it sets on an FHWA-funded construction contract (as of May 2015).
- Include utilization of other DBEs as neutral participation and count it toward the agency’s overall DBE goal. For example, ODOT counts any participation of DBEs other than African American- or Subcontinent Asian-owned firms toward its overall DBE goal for FHWA-funded contracts.

There is no difference in how agencies with UDBE contract goals programs certify firms as DBEs. Any DBE can participate in all aspects of the DBE Program except for DBE contract goals for that agency.

The Keen Independent 2015 Disparity Study includes additional information for ADOT as it considers whether all groups or only some of the groups listed above should be eligible for the DBE contract goals element of the Program.

Promoting DBE participation as prime contractors. The Federal DBE Program calls for agencies to remove any barriers to DBE participation as prime contractors and consultants, but does not require agencies to operate programs that give preference to DBE primes. Quotas are prohibited.

The Federal DBE Program requires agencies such as ADOT to develop programs to assist all small businesses.⁶ For example, small business preference programs, including reserving contracts on which only small businesses can bid, are allowable under the Federal DBE Program.

Promoting DBE participation as subcontractors. In accordance with federal regulations and subject to USDOT approval, an agency can decide that it will use DBE contract goals as part of its operation of the Federal DBE Program. ADOT currently uses DBE contract goals for certain FHWA-funded contracts. (ADOT did not set DBE contract goals from January 2006 through fall 2010 as explained in Chapter 2.)

⁶ 49 CFR Section 26.39.

Past court challenges to the Federal DBE Program and to state and local agency implementation of the Program.

Although agencies are required to operate the Federal DBE Program in order to receive USDOT funds, different groups have challenged program operation in court.

- A number of courts have held the Federal DBE Program to be constitutional, as discussed in Chapter 2 and Appendix B of this report.
- State transportation departments in California, Illinois, Minnesota, Montana and Nebraska successfully defended their operation of the Federal DBE Program, as have several cities and other local government agencies. The Washington State Department of Transportation was not able to successfully defend its operation of the Federal DBE Program. (See Chapter 2 and Appendix B.)

In *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation*, the Ninth Circuit Court of Appeals examined the methodology and results of the disparity study David Keen directed for the California Department of Transportation (Caltrans). (Mr. Keen also provided expert testimony in this case.) As discussed in more detail in Appendix B, the Ninth Circuit favorably reviewed the methodology and the quantitative and qualitative information provided in the disparity study and determined that the information justified Caltrans' operation of the Federal DBE Program. Keen Independent is applying a methodology in ADOT's 2015 Disparity Study that is very similar to what the court favorably reviewed in the Caltrans case.

As discussed in Chapter 2 of this Disparity Study, ADOT also succeeded when facing a legal challenge to its implementation of the Federal DBE Program.

C. Analyses Performed in the Disparity Study and Location of Results

Figure 1-2 on the following page provides a side-by-side comparison of chapters in the 2014 Availability Study and chapters in the 2015 Disparity Study.

- The first five chapters of the Availability Study are updated and included in the Disparity Study report.
- Chapter 6 of the Availability Study, which examined the overall goal for FHWA-funded contracts, is consolidated with Chapter 7 of the Availability Study (neutral projections) in a new chapter in the Disparity Study (new Chapter 8).
- Not shown in Figure 1-2 are the ten appendices that appeared in the 2014 Availability Study, which are also included in the 2015 Disparity Study report. Appendix B has been updated with new court decisions and Appendix J, which now includes comments from in-depth interviews, availability interviews, 2015 public meetings and other communications, is substantially expanded from what appeared in the Availability Study.

Figure 1-2. Chapters in the 2014 Availability Study and 2015 Disparity Study reports

Chapter	Description of 2014 Availability Study report chapter	Changes or additions in 2015 Disparity Study report chapter
ES. Executive Summary	Brief summary of study results	Updated with Disparity Study results
1. Introduction	Study purpose, study team and overview of analyses	Updated to discuss Disparity Study
2. Legal Framework	Summary of Federal DBE Program regulations and relevant court decisions	Updated with latest legal decisions and any USDOT guidance
3. ADOT Transportation Contracts	How the study team collected contract data and defined the geographic area and transportation contracting industry	Updated to include additional data collected, plus information about FTA-and FAA-funded contracts
4. Marketplace Conditions	Summary of quantitative and qualitative information about the Arizona transportation contracting marketplace	Updated to include additional in-depth interviews conducted since 2014
5. Availability Analysis	Methodology and results regarding availability of minority- and women-owned firms and other businesses for ADOT contracts and subcontracts	Updated to include information about FTA-, FAA- and state-funded contracts, plus new refined data about potential DBEs for FHWA-funded contracts
6. Utilization and Disparity Analysis	Not in 2014 Availability Study	Comparison of utilization and availability of minority- and women-owned firms (disparity analysis)
7. Exploration of Neutral Explanations for any Disparities	Not in 2014 Availability Study	Further examination of disparity results to determine if any can be explained by neutral factors
8. Overall DBE Goal for FHWA-funded Contracts	Information to review when setting a three-year overall DBE goal, consideration of a “step 2 adjustment” (was Chapter 6), and neutral projection (was Chapter 7)	Updates the Availability Study analysis based on additional information, and combines it into one chapter.
9. Overall DBE Goal for FAA-funded Contracts	Not in 2014 Availability Study	Information for DBE Program for FAA-funded contracts
10. Overall DBE Goal for FTA-funded Contracts	Not in 2014 Availability Study	Information for goal and Program operation for FTA-funded contracts

The following briefly describes where to find specific information in the 2015 Disparity Study report.

Legal framework. Chapter 2 summarizes the legal framework for the study. Appendix B presents detailed analyses of relevant cases.

Collection of prime contract and subcontract information for past USDOT- and state-funded-contracts. The study team collected information about past FHWA-, FTA-, FAA- and state-funded contracts awarded by ADOT or by local public agencies from July 2007 through June 2013. Chapter 3 outlines the data collection process and describes these contract data. It expands upon a similar chapter in the 2014 Availability Study. Appendix C provides additional documentation.

Analysis of local marketplace conditions. The study team examined quantitative and qualitative information relevant to the Arizona transportation contracting industry. Chapter 4 synthesizes quantitative information about local marketplace conditions. In accordance with USDOT guidance, Keen Independent analyzed:

- Any evidence of barriers for minorities and women to enter and advance in their careers in the construction and engineering industries in Arizona (detailed results in Appendix E);
- Any differences in rates of business ownership in Arizona (discussed in detail in Appendix F);
- Access to business credit, insurance and bonding (detailed results in Appendix G);
- Any differences in measures of business success and access to prime contract and subcontract opportunities (examined in detail in Appendix H); and
- Certain other issues potentially affecting minorities and women in the local marketplace.

The quantitative information in Chapter 4 and Appendices E through H is the same as what was included in the 2014 Availability Study published in fall 2014.

Chapter 4 also summarizes analysis of qualitative information, including results of 66 in-depth personal interviews with business owners and trade associations, and public input as part of the public comment process for the 2014 Availability Study and 2015 Disparity Study. Appendix J of this report provides detailed analysis of this qualitative information.

This combined quantitative and qualitative information about the marketplace is relevant to ADOT's development of an overall DBE goal and its projection of how much of the goal will be met through neutral means.

Availability analysis, including calculation of base figure for overall DBE goals. Keen

Independent's availability analysis generates benchmarks to use when assessing ADOT's utilization of minority- and women-owned firms. The availability results also provide information for ADOT to consider when setting its three-year goal for DBE participation on FHWA-, FTA- and FAA-funded contracts.

Discussion of results is organized as follows:

- The methods used to collect and analyze availability of minority-, women- and majority-owned firms;
- Availability benchmarks used in the disparity analysis; and
- Information relevant to ADOT's "base figure" for its overall DBE goals for FHWA-, FTA and FAA-funded contracts.

MBE/WBE utilization and disparity analysis. Chapter 6 presents Keen Independent's analysis of the utilization of minority- and women-owned businesses in ADOT's FHWA-, state-, FTA- and FAA-funded contracts during the study period. The disparity analysis in Chapter 6 compares utilization to availability to determine whether there is underutilization of minority- or women-owned firms in ADOT transportation contracts.

Chapter 7 further explores this information, including results for different types of ADOT contracts. It also contains analysis of DBE participation on FHWA- and state-funded contracts, and explores whether there is any evidence of overconcentration of DBEs.

Information for overall DBE goal and DBE Program operation for FHWA-funded contracts.

Chapter 8 refines the analysis of overall DBE goal, projection of neutral attainment and other program issues regarding FHWA-funded contracts presented in the 2014 Availability Study.

Information for overall DBE goal and DBE Program operation for FTA-funded contracts.

Chapter 9 provides similar information related to the overall DBE goal and program operation for FAA-funded contracts.

Information for overall DBE goal and DBE Program operation for FTA-funded contracts.

Keen Independent presents information related to the overall DBE goal, neutral projection and program operations for FTA-funded contracts in Chapter 10.

In addition to the chapters described above, ten report appendices provide supporting information concerning 2015 Disparity Study methodology and results.

D. Public Comment Process for the 2015 Disparity Study Report

As it did with the 2014 Availability Study, ADOT published the Disparity Study report for public comment before Keen Independent finalized the report. The public comment period for the report and proposed overall DBE goal remained open through July 23, 2015.

ADOT held four public meetings concerning the Disparity Study and ADOT's proposed DBE goals:

- Flagstaff on July 8;
- Yuma on July 13;
- Tucson on July 14; and
- Phoenix on July 16.

The public was able to give feedback at those meetings and provide written comments (a) in person at the hearings, (b) online at www.adotdbestudy.com, (c) via email at info@adotDBEstudy.com and (d) through regular mail.

Keen Independent reviewed information from the public meetings and each of the written comments submitted before preparing a final Disparity Study report. This process closely follows the approach for the 2014 Availability Study.